

**BAR  
STANDARDS  
BOARD**

REGULATING BARRISTERS

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**Table of Contents – Ctrl + click to jump**

- 1. Introduction..... 2
- 2. Risk assessment and referral of allegations for investigation ..... 3
- 3. The Summary Sheet ..... 7
- 4. Conduct of the investigation ..... 8
- 5. Evidence of potential new allegations arising from an investigation ..... 16
- 6. Action following the conclusion of an investigation ..... 17
- 7. Application of the risk level to post-investigation decisions..... 18
- 9 Staff authority to take decisions ..... 21
- 10. IDP referrals ..... 24
- 11. Communicating the outcome of the investigation..... 25
- 12. Reconsideration of decisions ..... 26
- 13. Withdrawing allegations ..... 27
- 14. Informal reports to the Regulatory Operations Department ..... 28
- 15. Interim suspension and Fitness to Practise..... 29
- 16. Consistency of staff decision making ..... 30

## 1. Introduction

- 1.1. The purpose of this document is to supplement the Enforcement Decision Regulations (EDRs) by providing more detailed guidance for staff in the Investigations and Enforcement Team (I&E) of the Bar Standards Board (BSB), and members of the Independent Decision-making Body (IDB), on the procedure and decision-making processes applicable to the investigation of allegations following a preliminary assessment (for details of the preliminary assessment process see *ROD02 - Initial Assessment of Reports (Assessment of incoming information)*)
- 1.2. While this document is primarily intended to provide internal guidance for staff and other decision-makers, it is published on the BSB website and will also assist the public and the profession to understand the investigation process.
- 1.3. The Bar Standards Board (BSB) takes an outcomes-focussed and risk-based approach to regulation and this is reflected in the terms of the BSB Handbook which sets out the framework for taking decisions on information received or allegations raised about the conduct of 'applicable persons'.
- 1.4. In this document, in accordance with Part 6 of the BSB Handbook, the term 'applicable persons' is used to refer to:
  - individual barristers (registered or unregistered) or registered European Lawyers;
  - authorised (non-BSB) individuals or BSB regulated managers; and/or,
  - BSB authorised bodies ("entities"); and/or,
  - Persons employed by a practising barrister, registered European lawyer or BSB entity, or managers of a BSB entity.
- 1.5. The Enforcement Decision Regulations<sup>1</sup> ("the EDRs") set out in Part 5A of the Handbook, stipulate the decision-making framework and the outline process for taking decisions on enforcement action. All decisions taken by staff are taken under delegated authority from the Commissioner and staff should refer to the Scheme of Delegations for the detail of what decisions they can take. This document can be found in the BSB Governance Manual, on the Governance documents page of the BSB website. Any decision taken during or after an investigation must be taken in accordance with the BSB's Enforcement Strategy (see rE25 of the EDRs). This requirement applies to both staff and panels of the IDB.

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<sup>1</sup> The Enforcement Decision Regulations came into force on 15 October 2019 and replaced the Complaints Regulations at Part 5A of the BSB Handbook.

- 1.6. The Enforcement Strategy also stipulates that enforcement action will focus on the issues that pose the greatest risk to the regulatory objectives and be proportionate to the identified risks. Risks are assessed in line with the BSB's Risk Methodology as referred at paragraph 18 of the Enforcement Strategy.

## 2. Risk assessment and referral of allegations for investigation

- 2.1. As a risk-based regulator, the BSB takes decisions based on the risk posed to regulatory objectives of the conduct in question. Risk assessments of issues raised in reports are conducted at two stages of the process that may lead to enforcement action:

- i. at the initial assessment stage prior to any issues arising from a report being referred for formal investigation and thereafter accepted as formal allegations; and
- ii. at the conclusion of an investigation into the allegations (post-investigation assessment).

- 2.2. While a risk level will be allocated to a case at the beginning of an investigation based on the initial assessment, Case Officers should be live to any evidence received during an investigation that might alter the original risk level.

- 2.3. The procedure for the initial assessment of reports *ROD02 - Initial Assessment of Reports (Assessment of incoming information)* should be read in conjunction with this document. Initial assessments are carried out by the BSB's Contact and Assessment Team (CAT). A referral to I&E for an investigation is only a recommendation based on the CAT assessment of whether there is evidence of a potential breach of the BSB Handbook<sup>2</sup>, or a potential breach of the Handbook that satisfies the disqualification condition, which may warrant investigation.

- 2.4. Where a referral for potential enforcement action is made to I&E, it will be sent to the Head of I&E with the potential breach(es) identified by CAT clearly marked along with the associated risk rating<sup>3</sup>.

- 2.5. **Categorisation:** The Head of I&E will assign an initial categorisation to the potential allegation and then allocate it to an appropriate Case Officer (CO)<sup>4</sup>, in

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<sup>2</sup> The BSB Handbook applies to conduct occurring after 6 January 2014, for conduct occurring before that the date the terms of the Code of Conduct, 8<sup>th</sup> Edition will apply.

<sup>3</sup> As explained in *ROD02*, there may be situations where a separate risk rating is also recorded on the file for matters identified in the same report that are not potential breaches, but this separate rating is not relevant for I&E purposes.

<sup>4</sup> The term "Case Officer" includes all staff with the title Case Officer, Senior Case Officer and Casework Manager. It also includes the Head of Investigations and Enforcement if appropriate.

accordance with the guidance in *LED03 - Categorisation of Allegations*. It is the responsibility of the Head of I&E to ensure that the name of the allocated CO and case category is registered on the Case Management System (CMS).

- 2.6. Where there are several linked cases concerning, for example, a number of applicable persons in one entity, the Head of I&E should consider assigning these cases to the same CO wherever possible, keeping in mind their existing case load. In doing so, the Head of I&E should take into account: the need for cases to be dealt with consistently and progressed simultaneously; and any issues of confidentiality between the various parties associated with the same entity/barrister.
- 2.7. **Steps following allocation:** Once the categorisation and allocation have been decided by the Head of I&E, the file will be passed to the allocated CO. The CO should review the file as soon as possible and take the formal decision on whether to treat the breaches identified by CAT as an allegation(s), taking into account the guidance set out in *ROD02 - Initial Assessment of Reports (Assessment of incoming information)*.
- 2.8. COs do not have to accept the referral from CAT and, if after considering in detail the report and associated documentation, the CO considers that the referral should not have been made, the CO can refer the case back to CAT. A Casework Manager or the Head of I&E must approve any referral back to CAT.
- 2.9. COs are authorised to treat a potential breach(es) arising from a report as an allegation under rE12 if there is sufficient evidence of a potential breach of the BSB Handbook or if the disqualification condition is potentially satisfied. The CO must take into account the factors listed in rE13 which include whether the conduct disclosed by the report, or its consequences presents sufficient risk to the regulatory actions to justify action. An assessment of the level of risk posed by the conduct will have been carried out as part of the initial assessment and normally conduct rated as medium or high risk will be referred for investigation.
- 2.10. **Multiple allegations:** the report being considered may contain more than one allegation against the same barrister and COs will need to consider carefully whether the breach(es) identified by CAT are appropriate and/or whether there are other breaches that should be treated as allegations.
- 2.11. Generally, an allegation should only cover one potential breach of the Handbook. Therefore, one referral from CAT may result in more than one allegation being put to the barrister. For example, a barrister is referred for consideration of enforcement action (an investigation) because they are subject to a criminal conviction that they had not reported promptly or at all. This would result in two allegations for separate breaches of the Handbook based on

different facts: (1) the criminal conviction (potentially a breach of CD5 and/or rC8); and (2) the failure to report (potentially a breach of CD 5 (and rC65).

- 2.12. However, it is also possible that one allegation could relate to more than one breach of the Handbook. This will usually occur where the same facts could give rise to different breaches. For example: a pupil reports they have been sexually harassed. The conduct could represent both a breach of CD3 and CD5 and maybe other provisions of the Handbook depending on the circumstances. In such a case, only one allegation would need to be recorded on the CMS but it would have two or more potential breaches attached to it.
- 2.13. On allocation, the CO should review the entire file and take their own view as to which parts of the issues of concerns arising from the report amount to an allegation. It will be for the Officer to decide how many allegations are recorded to reflect the conduct and the potential breaches of the Handbook.
- 2.14. If the CO decides to treat all the issues of concern as referred by CAT as allegations, it is not necessary to carry out a formal review of the CAT risk assessment. However, the CO should look at the risk assessment to check that there are no issues which might call into question the basis of the referral.
- 2.15. If the CO decides to treat only some of the concerns identified by CAT as forming part of the allegation(s), or takes the view that there are other potential breaches in the report that were not identified by CAT that should form an allegation, the CO should re-run the risk assessment based solely on those allegations that the CO considers should be taken forward to investigation. It will not be necessary to do this, however, if it is clear that the overall risk rating will remain the same. This might be the case where a serious aspect is treated as an allegation, but a less serious one is not.
- 2.16. **Allegations and aspects** – allegations are registered on the CMS as “aspects”. CAT will have identified preliminary aspects and recorded them on the system as part of the assessment process. Therefore, after deciding which of the concerns raised in a report should be treated as allegations, the CO should confirm/amend the aspects recorded on the CMS. The CO should then register the case as being “under investigation”. Where relevant, the Case Officer should mark those aspects that are not going to be treated as allegations as “referral dismissed”: this effectively means that the concern(s) are not being taken further.
- 2.17. **Deciding not to raise an allegation:** After a detailed reading of the report, a CO may decide not to raise any allegations for example, the conduct could more appropriately be dealt with by another person or body under the provisions set out at rE4-rE11. The CO must have good reason for such a decision. In this situation, the CO should consult with the Head of I&E and, if

agreed, the matter should be informally discussed with CAT as to whether the concern(s) in the report should be treated as an allegation(s) or an alternative option followed. If the teams are unable to reach a decision, it should be escalated to the Director of Legal and Enforcement for a final decision.

- 2.18. If it is agreed that an allegation should not be raised, the report should be referred back to CAT for handling as if the matter had not been referred to I&E. In these circumstances, it is the CO's responsibility to provide written reasons for the decision to refer back, which the CAT team will incorporate into their correspondence to the person who made the report. The reasons should be recorded on the CMS and in an email sent to CAT confirming the return of the report. It will be for CAT, not I&E, to communicate the final decision on the report to the appropriate parties. Once recorded on the CMS as referred back the I&E part of the case on the system will be recorded as closed.
- 2.19 **Placing investigation of allegations on hold:** If it is necessary to place an allegation on hold, it should first be accepted for investigation before recording this. Common reasons for putting investigations on hold are: pending the outcome of associated court proceedings; and ill-health of the barrister or person making the report. Consideration should be given to whether the decision to put the investigation on hold should be authorised by a Casework Manager or the Head of I&E. Whether this is necessary will usually be dependent on the length of any proposed delay: if case needs to be put on hold for a month or more, authorisation should be sought from the Head of I&E. A full record of the reasons for putting the case on hold should be recorded on the CMS.
- 2.20. Factors that should be taken into account when deciding whether an investigation should be put 'on hold', or deciding our position regarding a proposed delay include, but are not limited to:
- Whether there are ongoing proceedings (particularly regulatory or criminal proceedings, including appeals, or linked complaints) which relate to the allegations;
  - Whether there is a real risk that an investigation of the allegation by the BSB would interfere with, prejudice or undermine ongoing proceedings or their outcome;
  - Whether new allegations have arisen (whether in relation to the same barrister or not) that should be investigated and considered in parallel to the current investigation;
  - Whether there is clear evidence of a physical or mental health issue relating to the barrister and an indication of when this may be resolved (but see also the considerations listed in paragraphs 4.8 and 4.9 below); and

- The public interest in the prompt resolution of the allegation(s). This may include the impact upon the witnesses or others involved in the case.

### 3. The Summary Sheet

- 3.1. Following acceptance of the referral from CAT and the recording of the allegations as being “under investigation”, the CO should draft the Summary Sheet. This is a document summarising and setting out the allegation(s) that will be investigated. The sheet should identify which facts form the basis of each allegation, along with the corresponding potential breaches of the Handbook which have been identified. Where relevant, the covering letter should also inform the applicable person of any parts of the initial report that are not being investigated and give brief reasons why.
- 3.2. The Summary Sheet should be sent to the applicable person(s) subject to the allegation, and, if necessary, any witnesses or others involved in the case. COs are required to prepare a summary of the allegation(s) in all cases.
- 3.3. When dealing with allegations against a number of applicable persons which have arisen from the same report (e.g. about an entity) or allegations concerning both an entity and individuals within that entity, careful consideration will need to be given to the contents and format of the Summary Sheet in terms of what is disclosed about the other applicable persons in each case. The CO must determine, on a case-by-case basis, what approach should be taken to completing the Summary Sheet (for example, whether the details of the allegations against multiple applicable persons should be summarised in one sheet, or whether the allegations against each applicable person should be set out in separate Summary Sheets).
- 3.4. The approach that should be taken will be dependent on whether it is necessary for the effective progress of the cases for the details of the allegations to be disclosed to all applicable persons or whether each allegation against separate individuals should remain confidential to ensure proceedings are not prejudiced at a later stage. If details of an allegation relating to one person are to be disclosed to another, authority for the disclosure should be obtained from the Head of I&E or the Director of Legal and Enforcement, in accordance with rE64.7 (see paragraphs 4.8 to 4.10 below).
- 3.5. **Reasonable adjustments:** All initial letters to applicable persons, and any other persons it is necessary to communicate with in the course of the investigation e.g. potential witnesses, should include a request that they let us know if they require any reasonable adjustments to enable them to participate fully in the investigation. Any adjustments agreed must be marked on the file and the CMS: see *BSB03 - Reasonable Adjustments* for further information. COs need to be aware that the considerations outlined in *LED27 - Guidance on*

*working with witnesses*, particularly in relation to vulnerable witnesses, apply equally to applicable persons.

- 3.6. **Reports made by the Legal Ombudsman:** Where the person who made the report is the Legal Ombudsman (LeO), LeO will have already addressed any service elements related to the allegation(s). The BSB does not have the jurisdiction to consider service issues unless they may also amount to a breach of the Handbook/Code. If necessary, the Summary Sheet and/or covering letter (see paragraph 3.1) should make it clear which issues have already been considered by LeO and therefore will not be included in the investigation and also those matters which, although considered by LeO to disclose a potential breach of the Handbook, the BSB does not consider require investigation.

#### **4. Conduct of the investigation**

- 4.1. The purpose of the investigation is to gather any evidence necessary to establish whether or not there has been a breach of the Handbook/Code and, if so, to obtain evidence that may or may not support enforcement action either in the form of the imposition of an administrative sanction or a referral to disciplinary action (Determination by Consent or a Disciplinary Tribunal).
- 4.2. As noted above, COs are required to prepare a summary of the allegation in all cases.
- 4.3. The CO should write to the applicable person(s) subject to the allegation(s), or in the case of allegations about an entity, the individual responsible for responding to the allegations on the entity's behalf (the CO may need to make enquiries of the entity in order to establish who this person will be). Within the letter, the CO should also set out the potential breach(es) of the Core Duties or parts of the Handbook identified, and enclose copies of: the Summary Sheet; the reporting form or other documentation containing the information reported to CAT (where there is no reporting form); and any other relevant supporting documentation. The applicable person(s) should be asked to provide:
- a response to each allegation under investigation;
  - any supporting documents that are relevant to the allegation(s), such as notes of meetings, skeleton arguments and court orders; and,
  - if applicable, responses to any specific requests for evidence the BSB requires or answers to questions.
- 4.4. **Deadline for response:** where an investigation concerns a single applicable person, an initial deadline of three weeks for a response should be set, unless there is a clear reason on the papers to reduce or extend this deadline, for



example, if there has been a request for a reasonable adjustment due to a disability. Where the investigation concerns a large entity or group of applicable persons within an entity, the CO has the discretion to set the initial deadline for a response at up to six weeks, since these types of investigations may be more complex. There may also be a greater need for an entity to gather information from a range of sources, as well as hold discussions internally, before submitting a response.

- 4.5. The CO may grant reasonable extensions if requested by the applicable person(s) and supported by good reasons. They should consult with their line manager/the Head of I&E if they are unsure whether an extension is reasonable in the circumstances.
- 4.6. Reasonable extensions of time to respond to allegations should be granted to any party involved in an allegation where there is good reason to do so. "Good reason" will include, but is not limited to, the following:
  - The need to make reasonable adjustments for a person who is disabled;
  - Short term sickness;
  - Serious illness;
  - Pre-booked holiday; and/or
  - Serious personal problems such as bereavement, family breakdown or unexpected caring responsibilities.
- 4.7. The length of an extension arising from the need to make reasonable adjustments will depend on the circumstances of the individual and should be for as long as is reasonably required to accommodate the individual's needs. Where an extension is requested for medical reasons it may be necessary to ask for medical evidence in support of the application for an extension (see paragraph 4.9). As a rough guide:
  - a two-week extension should be granted for sickness or holiday;
  - extensions in relation to serious personal problems should not normally exceed a month unless there is clear evidence as to why a longer extension is reasonable; and
  - extensions of several months are appropriate in cases of serious illness but only where medical evidence is provided.
- 4.8. Extensions due to illness should be carefully considered but should be short in length where the barrister is continuing to practise and again, may require the provision of medical evidence. Medical evidence should not be automatically accepted but should be considered carefully in terms of the specific impact on the barrister of any medical issues. Clear medical evidence should not be rejected without very good reason, which must be recorded. If the medical

evidence is out of date or insufficiently specific, it may be appropriate to request up to date evidence from the barrister.

- 4.9. Where extensions sought are longer than two weeks, the CO should discuss this with their line manager. Extensions of more than three weeks on health grounds should be supported by a doctor's note or medical report. Where such documentary evidence is provided, the length of the extension should be commensurate with the nature of the condition and the medical advice given. Normally an extension on medical grounds will not require the investigation to be formally put on hold unless the evidence indicates that it is not possible to determine when the applicable person will be likely to return to a state of health that allows the investigation to progress. In these circumstances, consideration should be given to formally placing the case on hold (see paragraph 2.19-2.20 above).
- 4.10. **Confidential information:** The applicable person(s) should be informed in the initial investigation letter that if they provide a response to the allegations, it may be sent to potential witnesses for comment as part of the investigation. The applicable person(s) should also be informed that if they wish to include confidential or privileged information as part of their response, the information should be provided on a separate sheet, clearly marked as confidential (or privileged). This would be appropriate where the applicable person(s) wishes to provide information such as copies of instructions, or confidential, personal or medical information, for example. The letter should inform the applicable person(s) that the decision about whether to disclose the information they wish to keep confidential will be for the BSB to take after considering their reasons for wanting to keep it confidential.
- 4.11. At any stage in the investigation, the CO will need to consider sharing with witnesses or other people details of other related allegations, which they are not already aware of. The decision to share this information will be dependent on the circumstances and should be considered only: where it is necessary for the expeditious and fair investigation of a case; where comments may be required from the person; and/or where it is appropriate to keep them updated as to the progress of the investigation. An appropriate balance will need to be struck between maintaining confidentiality and ensuring that an effective and open investigation is carried out.
- 4.12. From time to time the BSB undertakes investigations arising from proceedings where there are other parties affected (for example the defendant client in a successful criminal appeal). In such circumstances, consideration should be given to whether to add this person formally to the CMS case file as an "interested person" so that they can be kept updated of the progress of the

investigation. The Case Officer may also wish to contact the person as a potential witness.

- 4.13. Disclosing details of an allegation with anyone associated with, but not involved in, the investigation of an allegation, will be made in accordance with rE64.7 of the Regulations (that is, "...in the public interest"). Permission will need to be sought from an authorised manager<sup>5</sup> in any case where such action is considered appropriate.
- 4.14. **Additional enquiries and obtaining advice:** it is for the CO to decide, based on the individual facts of the allegation(s), what further enquiries should be carried out as part of the investigation. If legal advice on the enquiries that need to be made is considered necessary, normally due to a specialised area of law or legal practice, the request should be made via the Legal Support Team, in accordance with the document: *BSB08 - Guidance on obtaining legal advice and privilege*. Broadly, the CO should send a request for advice accompanied by a note outlining the allegation, the issues and the advice required, along with any particular timescales. The Legal Support Team will then be responsible for considering whether the advice is necessary and proportionate, and sourcing the advice.
- 4.15. As a starting point, consideration should be given to making enquiries of (where relevant):
- a) any potential witnesses, whether or not identified in the information received (this may include people who have been affected by an allegation, for example clients of a barrister who has been the subject of a judicial referral/ criticism);
  - b) opposing counsel and/or the Judge;
  - c) the relevant Court in relation to judgments, evidence of convictions and/or transcripts of hearings;
  - d) the instructing solicitor; and
  - e) the Police and/or Crown Prosecution Service.
- 4.16. **Investigation plans:** An investigation plan must be completed in all cases that fall within category 2 or 3. In straightforward category 1 cases this may not be necessary but where there are witnesses and/or points in issue then it ought to be considered. A template investigation plan can be generated from the CMS and it should be used to record the rationale behind the steps in an investigation and what evidence is needed as the case progresses. In all but the most straightforward cases, the CO's line manager should review the plan.

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<sup>5</sup> Staff should be familiar with the organisation's Scheme of Delegations, contained in Schedule 4 of the BSB's Governance Manual.

In more complex cases the CO may wish to consult with their line manager and draw up the plan with their input.

- 4.17. Investigation plans will also be necessary in all cases where there is the potential for an application to disqualify arising from the allegation. In such cases, careful consideration should be given to what evidence, if any, can be obtained to establish if the causation element of the disqualification condition is satisfied.
- 4.18. Upon receipt of any responses or evidence in the case the CO should review the investigation plan and, if the steps are altered or added to, update the plan accordingly.
- 4.19. **Letters to potential witnesses:** communications with potential witnesses should include a summary of the issues on which comments or information is sought and it may be appropriate to send a copy of the “Summary Sheet”. If the potential witness is only involved in a small part of the allegation, the letter and any documents sent with it should be restricted to the specific issue(s) about which comments or information is required. Potential witnesses should be sent a tailored list of questions, rather than a general request for comments, to ensure that the responses provide the information needed to assess whether there has been a breach of the Handbook/Code. All initial letters to the applicable person(s), potential witnesses, interested persons and others must include the standard information on the General Data Protection Regulations, unless this has already been sent.
- 4.20. The normal deadline for potential witnesses to respond to enquiries is two weeks. However, the CO can grant reasonable extensions if there are good reasons to support such a request; extensions should normally be granted where they are required as a reasonable adjustment for someone with a disability. Guidance on factors to take into account when considering requests for extensions can be found in paragraph 4.5 onwards above.
- 4.21. In some circumstances, it may be appropriate to provide the witness with a redacted or summarised version of the applicable person’s comments, for example, when the response includes:
  - reference to relevant but confidential or legally privileged information;
  - reference to matters irrelevant to the substance of the allegation; and/or,
  - a report relating to other allegations not involving the witness.
- 4.22. If the applicable person does not want all of part of their response sent to potential witnesses for any other reason, the CO should discuss the case with their line manager or the Head of I&E. In all cases, either a Casework Manager

or the Head of I&E should authorise any decision not to disclose all or part of the applicable person's response to the allegation.

- 4.23. **Redaction:** Once the final decision has been taken to redact the information, this should be done using the specialist software provider or a **black marker pen** if the CO does not have access to the specialist software. If the latter method of redaction is used, those doing the redacting should ensure that this is done carefully. Staff should not use electronic means other than the specialist software to block out text, as some methods are not effective and the information can be potentially revealed if sent electronically. Therefore, all redactions should be made manually or using the specialist software package to mitigate this risk.
- 4.24. Since it is possible to read through marker pen, only photocopies of manually redacted papers should be sent to the person in question. Photocopies should be made on a dark setting as it is sometime possible to 'see through' the marker pen on pages photocopied on a lighter setting. The original copies of the redacted information should be retained on the case file.
- 4.25. **Contact with the person who made the report during the investigation:** The person who made the original report (if there is one) should be sent a letter telling them that we are investigating some or all of their concerns and what contact we are likely to have with during the investigation. Unless the person is a witness in the investigation, this contact will usually involve informing them of the outcome at the end of the investigation. The person should therefore be informed of our standard times for completing investigations.
- 4.26. Where the person is required to provide further evidence or act as a witness they should be treated as any other potential witness in the investigation and contacted where necessary to obtain evidence in the same way as any other witness. The only exception to this is where it has been agreed and authorised that the person who made the report is to be kept updated about the ongoing investigation.
- 4.27. In addition to the above, if an individual's identity and any information or documents they provide are to be disclosed to anyone else as part of the investigation of an allegation, that individual should be informed in advance of this.
- 4.28. **Investigation visits:** as a further general investigation tool, visits to chambers/entities or any other place for the purposes of collecting evidence can be undertaken where necessary. The obligation upon regulated persons to comply is set out at rC70 of the Handbook. These visits are distinct to any visits carried out by the Supervision Team or as part of a statutory intervention. A visit may be necessary where the allegation concerns, for example, a physical

location that needs to be viewed, significant administrative failures, accountancy issues, or where the CO suspects that a barrister has handled client money. Any decision to undertake such a visit should be discussed with the Head of I&E and authorised by the Head of I&E or Director of Legal and Enforcement.

- 4.29. **Gathering further evidence:** on receipt of responses from the applicable person or witnesses, consideration should be given to whether the information identifies further sources of relevant evidence that should be obtained. It is important that all reasonable lines of enquiry are pursued during the investigation to ensure that a robust decision can be made at its conclusion. Any such developments should be recorded on the investigation plan with rationale for why it is needed.
- 4.30. When relying upon witness statements given to a third party the Case Officer should be live to whether the credibility of the witness is in question. Where this is the case, it is likely to be appropriate for the Case Officer to make their own assessment of credibility for the purposes of the investigation. This can be done by taking a further statement or exploring issues. Consideration should be given to *LED27 - Guidance on working with witnesses*, particularly the following paragraph:

*5.1 Witness statements should normally be taken by staff. Where it is necessary for a third party, such as our solicitors, to take any witness statements, this should be specifically authorised by the Case Officer's line manager. Consideration needs to be given to any potential conflict of interest or independence issues that the third party may have, such as through prior involvement in the matter that gave rise to the allegation.*

- 4.31. **Dealing with privileged information:** In some investigations, documents that are relevant to considering the allegation may attract legal privilege that belongs to the client, not the barrister or entity. If the issue of legal privilege is raised as a reason not to provide information to the BSB then, in some circumstances, there is the power to apply to the High Court for documentation to be given to us. Before taking any such steps, consideration should be given to *LED05 - Guidance on requiring the provision of information*".
- 4.32. **Updates to the applicable person, witnesses and other person(s) on progress:** the applicable person must be kept regularly updated on progress of the investigation. Where other people have been involved in the investigation and have been identified as needing to be kept updated, the CO must also keep these people informed of progress and take all reasonable steps to manage expectations. This will be particularly relevant where there is likely to be a delay. As a general rule, updates should be provided every six weeks, but the frequency at which updates are given will depend on the stage the investigation

has reached, among other factors. For example, if a significant extension has been granted to an applicable person, witness or other person who is providing a response, the others who we have agreed to keep updated should usually be informed of this and told that a progress update will be provided once the response is received. Any update should include:

- what has been done to date;
- what is being done now and/or what will be done next; and,
- when they can expect a further update.

- 4.33. If a CO has advised a witness or applicable person that they can expect an update by a certain date, the CO must ensure that they do so by that date. This is the case even if no progress has been made since the last communication, in which case the CO should specify when a further update will be provided. It is important that COs who have taken over a case from another CO review recent correspondence to see when they are required to update witnesses and applicable persons.
- 4.34. **Seeking legal advice:** at any stage of the investigation, the option is available to COs to seek legal advice on issues relating to specific practice areas. A request for legal advice should be made to the Legal Support Team, in accordance with the document “Guidance on litigation support and obtaining legal advice from the Legal Support Team” (see paragraph 4.14-4.15 above).
- 4.35. **Disclosure of documents during an investigation:** a “Disclosure Log” must be completed if an allegation is referred to disciplinary action. It is not necessary at the investigation stage, but consideration should be given by the CO to completing a record of which documents have been sent out by the BSB, to whom and when along with any redactions made. This will be particularly useful in cases which are document heavy and there is regular correspondence with others involved in the case, for example an investigation which involves a number of authorised persons. Such a record will also be of importance in the event of a challenge during disciplinary proceedings or a Subject Access Request being made (see *BSB02 - GDPR/SAR*).
- 4.36. While the investigation of the allegation is still ongoing, disclosure of the fact of any allegation can only be made in accordance with *LED02 - Disclosure of Ongoing Allegations*. On completion of the investigation, any report to an Independent Decision-making Panel (IDP) (apart from DBC reports, which are dealt with under separate guidance) should not be disclosed in advance of its consideration by the IDP. Following the IDP consideration, these reports can be disclosed to the barrister on request. Any requests by others will be on a case by case basis.

- 4.37. **Disclosure in linked cases:** When investigating linked cases (i.e. cases involving more than one applicable person), consideration must be given to disclosing the fact of one allegation, or the documents relating to that allegation, to the barrister facing the linked allegation<sup>6</sup>. In particular, if something is submitted in response to one investigation that affects another investigation(s), then the relevant information should be disclosed to the applicable person(s) in the other investigation(s). Such disclosure can be authorised by the Head of I&E or Director of Legal and Enforcement under rE64.7 (“other good reason”) and the decision and reasoning behind it must be documented on both case files.
- 4.38. **Case management meetings:** In keeping with the BSB’s holistic approach to handling allegations, COs should arrange formal case management meetings with other departments in the BSB where there is an overlap in functions with other teams e.g. with where the Regulatory Operations Department is also dealing with issues arising from the circumstances of the allegation. Cases concerning entities are more likely to require formal case meetings. A record should be kept of all case management meetings and any decisions taken.
- 4.39. If both the Supervision Team and the LED intend to simultaneously pursue matters about the same individuals, entities or chambers, a case management meeting will be held to discuss and agree how to achieve effective collaboration in that particular case.

## **5. Evidence of potential new allegations arising from an investigation**

- 5.1. During the course of investigating an allegation, information may be revealed that shows evidence of a potential breach of the Handbook/Code that was not included in the original allegations. In these circumstances, the Head of I&E and Casework Managers (as well as the Director of Legal and Enforcement) have the authority to raise new, separate allegations.
- 5.2. Initial consideration needs to be given to whether the new potential breach should be treated as an aspect of the original allegation, or whether a new allegation should be raised under a new reference. This question will turn on the particular facts and circumstances of the allegation, but the general test is whether there is a sufficiently similar factual nexus with the original allegation.
- 5.3. In order to determine whether it is appropriate to raise a new allegation, a preliminary assessment will need to be conducted in line with *ROD02 - Initial Assessment of Reports (Assessment of incoming information)*. There is no need

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<sup>6</sup> When dealing with disclosure in linked cases at disciplinary proceedings stage, see *LED13 - Disclosure of Documents in Disciplinary Proceedings*.



for the matter to be referred back to the CAT for such an assessment to be made and it can be carried out by COs in the I&E Team subject to the Head of I&E, a Casework Manager or the Director of Legal and Enforcement taking the final decision to raise a new allegation.

- 5.4. Where the CO identifies, during the course of the investigation of an entity-related allegation, other potentially culpable applicable persons within that entity (whether for a potential breach/professional misconduct or an application for disqualification), they must open separate cases with new allegations (linking these with the existing case and allegations), and ensure reasonable steps are taken to ensure that each person is given the opportunity to respond to the allegations in writing (in compliance with rE15). Any decision to place a linked investigation on hold, whilst other investigations take place, should be taken on a case-by-case basis.

## **6. Action following the conclusion of an investigation**

- 6.1. The investigation will conclude at the stage at which all relevant evidence has been gathered, or the deadlines for responses have expired without a reply.
- 6.2. At the conclusion of the investigation, the CO should review the totality of the evidence to assess what action should be taken in accordance with rE19 of the Handbook. The CO must complete the post-investigation risk assessment on the CMS. The purpose of the post-investigation assessment is to determine what action should be taken in respect of the allegations which have been investigated.
- 6.3. **Evidence of a breach:** the first step of the post-investigation assessment is to determine whether there is sufficient evidence, on the balance of probabilities, to prove that a breach(es) of the Handbook has occurred in respect of each allegation. In some cases, there will be evidence of the conduct, but that conduct does not amount to a breach. In such cases, there is no evidence of a breach and the allegation should be dismissed.
- 6.4. In other cases, analysis of the evidence will show that while there is some evidence of a potential breach, it is not sufficient to prove the breach to the civil standard. If there is insufficient evidence to prove any breach, then the allegation should be dismissed. If there is no or insufficient evidence of a breach, there is no need to complete a post-investigation risk assessment.
- 6.5. In such cases, consideration should be given to whether it is appropriate to give formal advice to the applicable person in relation to the conduct. This will be appropriate where the investigation has given rise to a cause for concern. In giving advice, this concern and the wording of the advice should be clearly

identified in the decision that there is no breach. The decision to give advice and the wording should be approved by the Head of I&E or Director of Legal and Enforcement.

- 6.6. **Review of the risk level:** where there is evidence of a breach(es), the CO should complete the post investigation risk assessment on the CMS. The CO should consider all allegations where there is evidence of a breach as a whole and record the impact of the breach on the three headings of harm as well as if there are relevant previous decisions relating to the applicable person. Further guidance on how to assess this can be found in *ROD02 - Initial Assessment of Reports (Assessment of incoming information)*. This will generate a risk rating.
- 6.7. The CO should consider whether the automatically generated risk level is appropriate to the allegation(s). The risk level can be overridden by the CO if there are demonstrable and justified reasons for doing so. The decision on whether to override a risk level must be based on the evidence and all the circumstances and facts of the case must be recorded in the post-investigation assessment along with the reasons for the adjustment. The CO should consult with their line manager or the Head of I&E if they are unsure about what risk level is appropriate for an allegation.
- 6.8. In rare circumstances it may be more appropriate to risk assess one or more allegations in an investigation separately. This may occur where there is no factual link between the allegations or substantial mitigation that only applies to one of the allegations which have been investigated. Any decision to do so should be agreed with the CO's line manager and the rationale recorded on the case.

## 7. **Application of the risk level to post-investigation decisions**

- 7.1. The final risk level, as adjusted, if necessary, by the CO, will assist with determining what action should be taken on the allegation (or allegations assessed together):
  - i. **Green** – where an allegation shows evidence (on the balance of probabilities) of one or more Handbook breaches but the risk level is green, it will generally not be appropriate or proportionate for enforcement action to be taken. This is also defined as “low risk”. This is in line with the Enforcement Strategy. rE19.2 and rE22.2 allows allegations to be dismissed post-investigation where in all the circumstances enforcement action is not warranted. Authorisation from a Casework Manager, or above, must be obtained to take such action.

- ii. **Yellow or Amber** – This is also defined as “medium risk” and where an allegation shows evidence (on the balance of probabilities) of one or more Handbook breaches, there is a presumption that an administrative sanction would be appropriate and proportionate to meet the risk (see also paragraph 7.2 below). This may also indicate that a referral to the Supervision Team might be appropriate in such cases, in conjunction with another disposal of the allegation (see paragraph 9.3 below). See also section 14 below.
- iii. **Red** – where the risk level is red (also defined as “high”) and there is evidence that would meet the applicable standard of proof for professional misconduct allegations<sup>7</sup>, there is a presumption that the breach(es) and/or the surrounding circumstances are serious and administrative sanctions would not be appropriate and/or proportionate. The matter should be referred to disciplinary action as professional misconduct.

7.2. **Adjusting risk level to red/ high:** where the risk level of an allegation is assessed as yellow or amber, there may be specific risk factors present that would indicate that the imposition of an administrative sanction is unlikely to be proportionate and sufficient in the public interest. In these circumstances, the CO should consider adjusting the risk level to red. Such factors include, but are not limited to:

- a) the applicable person having a previous disciplinary history in relation to similar conduct;
- b) the applicable person having worked in an entity or entities where previous similar enforcement/disciplinary action has been taken, and the applicable person appears to have contributed substantially to such action having been taken;
- c) the applicable person having previously been subject to an administrative sanction for similar conduct;
- d) the conduct has wider implications for the administration of justice or public confidence in the regulatory system;
- e) information about the breach should be in the public domain in order to protect the public; and/or,
- f) the Sanctions Guidance<sup>8</sup> indicates that a suspension, disbarment or disqualification order might be imposed by a Disciplinary Tribunal in relation to the conduct.

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<sup>7</sup> For conduct beginning **before** 1 April 2019, the criminal standard of proof (beyond a reasonable doubt that a breach has occurred). For conduct **on or after** 1 April 2019, the civil standard of proof (on balance of probabilities).

<sup>8</sup> The “Sanctions Guidance” is produced by the Council of the Inns of Court/the Bar Tribunals and Adjudication Service (BTAS) and is available on the BTAS website.

## 8. Outcome of the investigation

8.1. Following the post-investigation assessment of any allegations, and subject to the categorisation of the allegation(s) (see section 9 below), the options for disposal are:

- a) staff dismissal of the allegation on the basis that there is insufficient evidence of a breach of the Handbook;
- b) staff dismissal of the allegation with formal advice given to the applicable person;
- c) staff decision to impose an administrative sanction (a warning or a fine of up to £1,000/£1,500 for individuals and entities respectively) where there is evidence (on the balance of probabilities) that the conduct constitutes a breach of the Handbook (and where the risk is green, yellow or amber and in appropriate circumstances). The breach must not be sufficiently serious to warrant disciplinary action for professional misconduct (see *LED08 - Administrative Sanctions and Appeals (Internal)* for further information on the application of administrative sanctions);<sup>9</sup>
- d) staff referral of the allegation against an applicable person direct to a Disciplinary Tribunal or the Determination by Consent procedure, where an administrative sanction is considered not to be appropriate or proportionate in all the circumstances (and therefore the breach is potential professional misconduct);

Allegations can be referred by staff where the subject matter involves:

- a conviction for an offence of dishonesty or deception; or
- a conviction for an offence under Section 4, Section 5 or Section 5A Road Traffic Act 1988 (Driving or being in charge of a motor vehicle with alcohol concentration/ concentration of a controlled drug above prescribed limit); or
- a breach of Part 3 or 4 of the *Handbook*; or
- any failure to pay an administrative fine within the relevant time; or
- a failure to comply with any requirements of a sanction imposed following *Disciplinary Action*;

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<sup>9</sup> Administrative sanctions cannot be imposed on 'non-authorised individuals' (see the definition in Part 6 of the Handbook), however, where appropriate, the sanction can instead be imposed on the entity within which the non-authorised individual works, provided that the investigation against the entity is also complete.

or

- e) referral of the allegation to the IDB for a decision (see paragraphs 9.2 and 9.13 and section 10 below).

- 8.2. In all cases, the CO should record the decision on what action is being taken in the appropriate sections of the post-investigation assessment.
- 8.3. In cases where the matter has been referred back by a Tribunal under rE209, guidance can be found in *LED20 - Guidance on three and five person DTs*.
- 8.4. As indicated above, there may be circumstances where allegations are appropriately assessed as yellow or amber (medium) risk, but an administrative sanction is not appropriate, and the case is therefore referred for disciplinary action. Such cases should be rare, and reasons should be documented for both the lower risk rating and the referral.

## **9 Staff authority to take decisions**

- 9.1. Relevant staff have the authority to take the following post-investigation decisions in accordance with the Scheme of Delegations, rE19.4 of the EDRs and *LED03 - Categorisation of Allegations*. Staff can<sup>10</sup>:
  - a) dismiss allegations classified as category 1;
  - b) dismiss allegations classified as category 2 where the evidence is weak and is unlikely to be proved on the balance of probabilities<sup>11</sup>;
  - c) impose administrative sanctions in relation to category 1 and 2 allegations; and
  - d) refer allegations classified as category 1 direct to a Disciplinary Tribunal.
- 9.2. COs are not obliged to take a decision in each of the cases above and can still refer the allegation to an IDP if it is felt that this would be more appropriate (see paragraph 9.13 and section 10). Where a staff decision is going to be taken, COs should obtain agreement from their line manager before taking a dismissal decision to confirm the approach is appropriate, even when the delegated authorities permit the decision to be taken by the CO. However, there may be times when it may be necessary to take the decision without checking first, such as where urgency requires it.

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<sup>10</sup> For an initial period of one year from the receipt of the first entity-related complaint, all complaints which concern an entity, regardless of their category, will be referred to the IDB to make a final decision on that complaint. This period of review may be subject to extension or reduction, in light of the number and complexity of entity-related complaints received.

<sup>11</sup> That is, not 'borderline' cases. See *LED03* for more detailed consideration.

- 9.3. In conjunction with any other decisions staff can also decide to refer an allegation for supervisory action. Supervision should be alerted to the allegation and the decision to refer.

#### **Formal advice on dismissal**

- 9.4. For advice to be given, a cause for concern must be clearly identified. Examples where this may be appropriate include, but are not limited to:

- a) Rudeness;
- b) Poor quality administration of practice;
- c) Inadvertent behaviour;
- d) The barrister's poor insight into the impact of their behaviour; and/or
- e) The barrister's poor understanding of their obligations under the Handbook.

#### **No enforcement action despite breach of the Handbook**

- 9.5. The decision to take no enforcement action will be used on rare occasions, almost always in low risk cases. It will be taken when there is evidence of a breach of the Handbook on the balance of probabilities, but circumstances are such that marking this breach is not proportionate. Examples include, but are not limited to:

- a) Where a relevant person has been disbarred/disqualified/authorisation has been revoked in relation to another matter;
- b) Where another allegation regarding the relevant person, relating to very similar conduct at a similar time, has already been disposed of;
- c) The barrister's physical or mental health is such that any risk to the Regulatory Objectives is negligible and it is highly unlikely that the relevant person will return to practise or be re-authorised;
- d) Where it is not proportionate to mark the breach by an administrative sanction, as the nature of the breach is not sufficiently serious.

- 9.6. In the case of a decision to take no enforcement action, formal advice can be given as discussed at 9.4 above.

#### **Referring to Disciplinary Action**

- 9.7. In deciding whether there is a realistic prospect of success, or whether it is in the public interest to refer a complaint to disciplinary action, COs should also take into account whether:

- it is possible to set out the facts of the conduct in a manner that clearly supports the contravention of a specific Core Duty or Handbook Rule;
- the central witnesses are credible and reliable;
- relevant witnesses are prepared to give live evidence at a Tribunal;
- the potential issues in dispute can be supported by documentary or live evidence;
- all the evidence needed to prove the charges against the barrister is available or can be reasonably obtained prior to the hearing; and/or
- Any defence or explanation put forward by the applicable person (or any alternative interpretation of the available evidence) is not likely to be accepted as a complete or partial defence to the charges, or to raise doubt as to whether the conduct in its wider context is sufficiently serious to be considered professional misconduct.

### **Referrals to the Regulatory Operations Department**

- 9.8. rE19 and rE22 allow for either the Commissioner (or delegated staff) or an IDP to formally refer (or recommend referral, in the case of the IDP) any allegations for supervisory action. This can only be done alongside any other decision made at the end of the investigation. When doing so, the parts of the allegation being referred should be clearly identified and recorded in the decision of the staff member/ IDP, including reasons.
- 9.9. The Supervision Team should be notified of the decision by email, with the CMS reference being used to identify where the information can be found. This should be by email to [supervision@barstandardsboard.org.uk](mailto:supervision@barstandardsboard.org.uk).
- 9.10. For informal reports to the Regulatory Operations Department, see section 14 below.

### **Allegations staff usually cannot take decisions on**

- 9.10. Staff do not have the authority to take decisions on category 3 allegations, which must be referred to the IDB. Category 3 allegations include those that:
- have attracted, or are likely to attract, media attention; and/or
  - may have wider implications for the public interest, the Bar or a section of the Bar, or the BSB;
- 9.11. Staff also do not have the authority to take decisions to refer allegations that potentially satisfy the disqualification condition to a disciplinary tribunal: such decisions must be taken by an IDP.

9.12. Ordinarily Category 3 cases will have to be considered by an IDP. However, for category 3 cases which fall within the categories set out in rE19.4, and therefore can be referred direct to disciplinary action by staff, there may be circumstances where the decision to refer is so clear as to make referral to the full IDP an unnecessary delay. This will usually be where there is no ambiguity in the evidence establishing a reasonable prospect of success or any significant challenge to the evidence obtained. In these circumstances, the Director of Leal and Enforcement can be asked to refer the case. Allegations which could be considered sufficiently clear include admitted conduct where there is a high likelihood of disbarment/ suspension for over a year. In allegations where this process is used, the reason for the decision being taken should be clearly recorded.

9.13. **Referral to an IDP:** while all category 3 allegations must be referred to an IDP (with the exception of those referred to in paragraph 9.12) and some category 2 (see paragraph 9.1 (b)), the option is always available for COs to refer any allegation in categories 1 and 2 to an IDP to make the final decision<sup>12</sup>. The decision to refer an allegation to an IDP will depend on the facts and circumstances, but a referral to an IDP is likely to be appropriate where:

- a) the decision on what action to take is not clear, or there are legal issues that are more appropriately considered independently;
- b) there is ambiguity in the evidence; and/or,
- c) there are sensitivities surrounding the allegation that mean it would be appropriate for an IDP to consider the matter and take the decision.

## 10. IDP referrals

10.1. Following the decision to refer an allegation to an IDP, the CO should prepare a report and bundle for the Panel's consideration. Further guidance can be found in *LED16 - Analysis Sheet Guidance (Report writing guidance for staff)*.

10.2. The full case file will usually form the documents for an IDP. The CO will need to arrange the bundle in an order that will assist the IDP in their decision making. There is further guidance on this in *LED16 - Analysis Sheet Guidance (Report writing guidance for staff)*. The CO needs to arrange for the bundle to be redacted (barrister's name and gender) by the external redaction company. The CO should bear in mind that this can take some time – around five working days for an average file. It is therefore good practice to make arrangements for

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<sup>12</sup> But see paragraph 9.2. above.



this to run alongside the drafting of the report for the IDP. The CO should liaise with the administrative staff to ensure that the bundle is available on Caselines once redacted. Before sending to redaction, the documents on the file should be arranged in line with the guidance in *LED16 - Analysis Sheet Guidance (Report writing guidance for staff)*.

- 10.3. Any report for the IDP will include an indicative risk rating, based upon the allegations which have been investigated. The risk assessment should still be run to produce this, completing the sections relating to harm and any modifiers. The indicative rating will mean that if the IDP do find that there is sufficient evidence of any breach of the Handbook then they can take into account the generated rating and whether they agree with it.
- 10.4. The report for the IDP should not include a recommendation for the IDP. Having considered the case, the IDP will provide a decision and the reasons for reaching it at the meeting.

## **11. Communicating the outcome of the investigation**

- 11.1. The subject of the investigation should be informed by letter of the outcome, with reasons why the decision was reached. This will either be those reasons given by the CO or, in the case of allegations considered by an IDP, the panel's reasoned decision. The panel's reasons for the decision should be pasted into the body of the relevant letter generated on the Case Management System.
- 11.2. Where there are other people involved in the investigation, for example because they are witnesses or have been updated about previous progress, then they should also be informed about the outcome of the post-investigation decision. It is not necessary in every case that the reasons of the panel be sent to these other persons (indeed, in the case of witnesses it may lead to the possibility of contamination).
- 11.3. In any cases where the decision sheet is sent, whether to other parties or as part of unused material, it should be checked by the CO before being sent to ensure any information that is considered confidential (for example health, financial or legally privileged) is redacted.
- 11.4. Any decision to inform persons other than the applicable person of the outcome of the investigation needs to be considered in line with rE64 of the EDRs. Even in relation to cases that have been referred to a Disciplinary Tribunal, the specific terms of the charge(s) are not normally put in the public domain prior to the hearing, so they should remain confidential unless the disclosure grounds are met.

## 12. Reconsideration of decisions

- 12.1. There is no right of appeal against decisions to dismiss or refer allegations to disciplinary action at the post-investigation stage. However, the Commissioner, and those delegated, have a discretionary power to reconsider an allegation which has been disposed of (rE61) – that is, to reopen the allegation and take the decision afresh. Examples of when this may be appropriate include:
- a) New evidence coming to the BSB’s attention that impacts upon the original decision; and
  - b) Where a procedural issue is highlighted that calls into question the validity of the original decision.
- 12.2. The need for a decision to be reconsidered may be identified internally without a request from either the applicable person or anyone else involved in the case. This is likely to be rare but where it does arise, the review of the case and the decision on what action to take can be conducted by the Head of I&E or the Director of Legal and Enforcement.
- 12.3. Where the applicable person or anyone else involved in the case raises concerns about a decision to refer allegations to disciplinary action or to dismiss an allegation, this should be treated as a “request for review”. It is not necessary for a person to state explicitly that they want a decision reviewed. For example, a communication may refer to material that was not before the original decision maker or dispute that correct procedure has not been followed. COs should be live to this in deciding whether to treat a communication as a request for review. However, mere disagreement with a decision will generally be insufficient to amount to a request for review of the post investigation decision.
- 12.4. Subject to the terms of *LED18 - Settling, Reconsidering and Withdrawing Charges*, if a communication is deemed to be a request for review, it should be referred to the Independent Reviewer (IR) unless it is very clear that the decision under consideration is flawed and needs to be taken again. The Head of I&E and Director LED are authorised to take such decisions. In all other cases, the IR will review the decision in question and make a recommendation to the Head of I&E or Director of Legal and Enforcement as to what action should be taken. Further information can be found in *BSB04 - Role and function of the Independent Reviewer*.

- 12.5. In summary, the CO will need to need to contact the IR, summarising the decision under review and drawing the IR's attention to relevant documentation. The IR will have access to the CMS and therefore it is not necessary to send documentation with the request. The CMS should be updated to show that the case has been referred to the IR.
- 12.6. Requests for review need to be responded to within 20 working days and the IR should normally be given 15 working days to complete the review. This means that requests need to be forwarded to the IR promptly. Where a response on the review is needed more quickly due to the implications for the future progress of a case, the CO should make this clear on the form and indicate the date by which the review needs to be completed. The Head of I&E should be copied in on any communication requesting the review.
- 12.7. On receipt of the IR's report of the review and recommendation(s), the Head of I&E or the Director of Legal and Enforcement will decide if the IR's recommendation is accepted. If the recommendation is that a different decision should be taken (that is, the case meets the rE61.1 or rE61.2 criteria), the formal decision to reopen the case and take an alternative decision will be taken by the Head of I&E or the Director of Legal Enforcement. The expectation is that recommendations made by the IR will be accepted unless there are exceptional reasons not to do so. Where this is the case, the Head of I&E or the Director of Legal Enforcement must record the reasons for not following the recommendation in whole or in part. In all cases, the IR must be informed of the decision taken on their recommendations.
- 12.8. The Head of I&E or the Director of Legal and Enforcement will inform the CO of the outcome of the IR's review.
- 12.9. The CO is responsible for updating the CMS and communicating the decision to the applicable person or other person and taking any necessary action to put the decision into effect. Where a case has already been referred to a Disciplinary Tribunal and the decision is that the allegation should not have been referred, the only option open to the BSB is to offer no evidence. (see *LED18 - Settling, Reconsidering and Withdrawing Charges*).

### **13. Withdrawing allegations**

- 13.1. On rare occasions it may be necessary to "withdraw" one or more allegations that are being investigated (under rE14.2) either during the course of an investigation or following a referral to disciplinary action. A withdrawal is not a "dismissal" or a final determination of an allegation: it is an indication that for some reason it is not appropriate or possible to proceed with the allegation. The types of situations that might give rise to the need to withdraw an allegation are:

- where evidence comes to light that an allegation has been raised in error e.g. a misunderstanding over a payment of a fine or completion of CPD; or,
  - where a barrister has been disbarred and there is no public interest in proceeding with other outstanding allegations; or
  - where there has been late compliance with a disciplinary order, which is corrected shortly after an allegation has been raised e.g. a fine is paid in full shortly after an allegation for non-compliance has been opened.
- 13.2. Allegations should not be withdrawn where the only issues relate to the cogency of the evidence.
- 13.3. Only the Director of Legal and Enforcement, the Head of I&E and Casework Managers are authorised to withdraw allegations.

#### **14. Informal reports to the Regulatory Operations Department**

- 14.1. It is important that relevant information is shared between BSB Departments/teams. The sharing of information on enforcement issues is crucial and such information, in summary, should be made available to other teams where relevant. The Supervision Team will have read access to the Enforcement Cases on the CMS so in highlighting the information a brief summary of what the concern is along with the case reference will usually be enough.
- 14.2. Information in relation to allegations, including those which have been dismissed or withdrawn or are received by I&E by any other avenue, could be relevant to the BSB's other functions, particularly the work of the Supervision Team. Therefore, a system for submitting "informal reports" from LED to the Supervision Team has been put in place (see *BSB10 - LED and Supervision*)
- 14.3. Staff in I&E are responsible for submitting "informal reports" to the Supervision Team. As a guide, I&E should share information that suggests issues or concerns in relation to, but not limited to, the following:
- The administration or governance of individuals' practices, chambers or entities;
  - The financial viability of chambers, entities or members of chambers or entities;
  - Where a chambers or entity may have a widespread problem in relation to the conduct of its members in a specific area;
  - The chambers' or entity's complaints handling process;

- Client care in relation to issues such as fees or terms of service; and/or
  - information about potential issues of discrimination or harassment, particularly in relation to pupils, within chambers.
- 14.4. This list is not exhaustive. If I&E staff believe that any information that they have may be of relevance to the supervision of individuals, chambers or entities, it should be shared with the Supervision Team
- 14.5. Upon receipt of the information, the Supervision Team will assess the relevance and reliability of the information to determine whether any follow up action is required. Any follow up action will be at the discretion of the Supervision Team.
- 14.6. The submission of an “informal report” does not amount to a formal “referral” and it will be for the Supervision Team to decide what use is made of the information (for example, it could inform whether attention needs to be paid to a particular chambers or whether a “thematic” review in a certain area of regulatory activity is warranted). For more information on the submission of informal reports see BSB10 - LED and Supervision.
- 14.7. Staff should also consider holding case management meetings (see paragraph 4.38 above) prior to or following the submission of an informal report, should either Team consider this to be beneficial and particularly where I&E and the Supervision Team are simultaneously considering matters relating to the same individuals, entities or chambers.

### **Concerns about a pupil supervisor**

- 14.8. Where allegations involve a barrister who is authorised to act as a pupil supervisor, there may be concerns about whether any breaches of the Handbook (or other causes of concern) might impact upon whether they are suitable to continue in this role. In such cases, the CO should inform the Authorisations Team within the Regulatory Operations Department. The information should be in writing by email and set out the details of the breach found, the case reference number and any relevant comments by an IDP. Any action relating to the removal of authorisation to act as a pupil supervisor will be for the Regulatory Operations Department to take.

### **15. Interim suspension and Fitness to Practise**

- 15.1. During an investigation information may be received which indicates that there could be a concern about whether a barrister should be permitted to continue practising. This can either be where the information means that one of the criteria in the Interim Suspension Regulations (rE268) are made out or where

information about the health of an applicable person causes a concern that the barrister's ability to practise is impaired.

- 15.2. Where such information is received consideration should be given to invoking the Interim Suspension or Fitness to Practise procedures. Details of these procedures can be found in *LED12 - Interim Suspension and Disqualification*.

## **16. Consistency of staff decision making**

- 16.1. Several processes are in place to ensure the consistency of decisions making at the post-investigation stage. These are:
- a) Regular reports to the IDB** – a summary report of all staff decisions to dismiss allegations or impose administrative sanctions is available for each IDB meeting, assisting with consistency in decision making.
  - b) Reviews by the Independent Reviewer** – as well as considering individual requests for review, the IR also carries out regular audits of a percentage of staff decisions for consistency and quality.
  - c) I&E Technical Meetings** - these take place monthly and can involve discussion around recent investigations and decisions that have been taken. These meetings allow COs to be aware of outcomes on similar cases to those in their caseload.